FOR ARGUMENT

In The

Supreme Court of the United States

October Term, 1979

No. 78-1007

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,

Petitioners,

vs.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

United States Constitution Cited:

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ARGUMENT

I.

The absence of formal congressional findings of past discrimination in the construction industry renders the MBE set-aside unconstitutional.

As the Government acknowledges, in passing the MBE requirement, Congress failed to make detailed findings of past discrimination in the construction industry sufficient to sustain the racial classification in question (Gov. Br. 26-31). The Government, however, would have us believe that the lack of any legislative findings or record incident to Congress' passage of the MBE Amendment is equivalent to the lack of any need for such findings in this case (Gov. Br. at 30). Such reasoning not only defeats the underlying purpose of the Equal Protection Clause, but serves to confound the issue of racial preferences with that of the extension of government benefits in general. Absent detailed and articulated legislative findings of prior discriminatory acts to justify the racially-based set-aside, the statute lacks a compelling state interest and is therefore unconstitutional (Pet. Br. at 15).

The Government attempts to defeat the policy behind the Equal Protection Clause which extends the fundamental constitutional guarantees to all people. Although Article I, Section 1 of the Constitution does not mandate that Congress make specific findings prior to the enactment of a statute, it is submitted that some factual basis disclosed by the record is in fact necessary to support a legislative enactment which provides a *preferential* racial classification resulting in a fixed racial quota. The cases which the Government cites to substantiate its proposition that Congress need not, if they so chose, record any element of factual support for such an enactment (Gov. Br. 28) are wholly inappropriate and thus inapplicable to the case at bar.

Reliance upon *Oregon v. Mitchell*, 400 U.S. 112, 284 (1970) (*see* Gov. Br. 28) and *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (*see* Gov. Br. 52, 61, 68), both of which upheld minimum eligibility standards for voting in federal and state elections, is inappropriate. The Government's use of these two cases to support its rationale for the dearth of legislative findings in regard to the MBE requirement is improper. Although the Court in *Oregon v. Mitchell, supra*, 400 U.S. at 284, stated that "[i]n the interests of uniformity, Congress may paint with a much broader brush than may this Court," (Gov. Br. 28), the Court went on to note that in both that case and in *Katzenbach v. Morgan, supra*, the Legislature made explicit findings on the respective records. *See* 400 U.S. at 132-133; *Katzenbach v. Morgan, supra*, 384 U.S. at 653. Furthermore, in both *Oregon* and *Katzenbach*, the statutes under consideration never attempted to revoke basic constitutional protections by granting *preferential* treatment to some while restricting the rights of others. Rather, the statutes which were the subject of those cases, *extended* the right to vote to a *greater number of people* than had previously been accorded that right by the respective state laws. Even if there had not been specific congressional findings in those cases, constitutional rights would not have been abridged because the voting acts expanded rather than narrowed, the availability of the elective franchise for *all*.

The MBE enactment, however, in enforcing a set-aside requirement on the bidding of all public works projects, imposes a cognizable injury in that it forecloses the opportunity for non-minority contractors to compete for at least 10% of the appropriated monies. To uphold the validity of the 10% MBE requirement, which accords a racial preference solely on the basis of race, would be the first time that this Court has sustained such a provision absent any record upon which to base such decision. Although the Government cites *Regents of the University of California v. Bakke*, 438 U.S. 265, 362-369 (1978) (Gov. Br. 22, 61) and *Steelworkers v. Weber*, ____ U.S. ____, 61 L. Ed. 2d 480 (1979) (Gov. Br. 59, 61) in an attempt to

sustain the continued utilization of race-conscious affirmative measures, it is petitioners' contention that these two cases, both of which involve voluntary affirmative action plans, are applicable only for a limited purpose.[1]

In *Regents of the University of California v. Bakke, supra,* Justice Powell indicated his approval of legislatively imposed quotas where "there has been *detailed legislative consideration* of the various indicia of previous constitutional or statutory violations" 438 U.S. at 302 n.41 (emphasis supplied).[2] Similarly,

1. In fact, the court in *Weber* specifically noted the narrowness of its inquiry. The court noted that the affirmative action plan at issue did not involve state action, and thus could not be challenged under equal protection principles. 61 L. Ed. 2d at 487. Moreover, the court found that minority exclusion from craft unions was so commonplace that judicial notice of same was proper. *See* 61 L. Ed. 2d at 486 and n.1. No such conclusion is warranted herein since the MBE requirement operates not to remedy employment discrimination, *i.e.*, historic exclusion of minorities from craft unions, but rather the underutilization of minority businesses. *See* Pet. Br. at 8 and n.2.

2. Justice Powell also stated in *Bakke:*

> ". . . there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group's general interest. *See United Jewish Organizations v. Carey,* 430 U.S. 144, 172-173, 51 L. Ed. 2d 229, 97 S. Ct. 996 (Brennan, J., concurring in part). Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. *See DeFunis v. Odegaard,* 416 U.S. 312, 343, 40 L. Ed. 2d 164, 94 S. Ct. 1704 (1974) (Douglas, J., dissenting). Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making." 438 U.S. at 298.

Justice Brennan declared that the Court's opinions in *Bakke* stood for the "central meaning" that the "[g]overnment may take race into account when it acts *not to demean or insult any racial group,* but to remedy disadvantages cast on minorities by past racial prejudice, *at least when appropriate findings have been made by judicial, legislative or administrative bodies with competence to act in this area.*" *Id.* at 325 (emphasis added). Implicit in the Court's language is the need to articulate the wrongs to be remedied and to carefully fashion the appropriate remedies.

II.

Least Onerous Means.

The Government suggests to this Court that the burden is on petitioners to demonstrate that less onerous means exist, to accomplish minority business participation in the construction industry, as a prerequisite to any finding of the MBE provision's unconstitutionality (*see* Gov. Br. at 65). Quite obviously, the Government's tortured speculative analysis of what Congress could reasonably have concluded, underscores the fact that the record is devoid of any attempt by that body to follow the dictates of this Court when proffered legislation impinges upon constitutional guarantees (*see id.* at 54, 66-68). Such guarantees are not so easily suspended without a clear showing in the record by the lawmakers, that no other alternative is available.

In *Dunn v. Blumstein,* 405 U.S. 330 (1972), this Court noted that a "heavy burden of justification is on the State" which enacted a law restricting voting rights, and that such legislation "will be closely scrutinized in light of its asserted purposes." *Id.* at 343. *See also,* Pet. Br. at 21-22. Finding that the Tennessee Legislature had in fact no evidence before it which would indicate the necessity of the statute at issue, this Court summarily struck down such law in favor of protecting the constitutional right to travel. *Id.* at 346.

Similarly, in the case at bar, Congress had nothing in the record before it which would tend to indicate the ineffectiveness of the various existing anti-discrimination provisions in, for example, the Civil Rights Act of 1964 or, the federally funded SBA program. (*See* Gov. Br. at 54, Pet. Br. at 22.) The Government's characterization of Congress' alleged "special ability to gather and evaluate a wide range of factual information." (*see* Gov. Br. at 52), most certainly yields to a policy of close scrutiny of the legislative record when the Court undertakes a review of facially discriminatory legislation. Whatever special ability or special competence Congress may possess when it enacts racially neutral legislation, the very foundation of due process and equal protection under the law requires that race-conscious legislation, whether enacted by Congress or otherwise, be subject to such rigid standard of review. Legislative classification, based upon the color of one's skin, is no less repugnant to the cherished principles of due process and equal protection because it happens to be born of Congress.[3]

The MBE provision was no more than an afterthought to an appropriations bill, totally devoid of the prophylactic prerequisites mandated by this Court.

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3. Moreover, the context in which the Government attempts to demonstrate this Court's recognition of any special ability by Congress to legislate is wholly discernable from the case at bar. Thus in *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (*see* Gov. Br. at 24-25) rather than attempting to legislate exclusionary provisions affecting members of the public, the Court upheld congressional *extension* of the elective franchise (*see* p. 3, *supra*).

In like manner, the Government's reliance upon *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) for support of its statement that "[e]ven the most carefully tailored remedial measure may sometimes have an adverse impact on the legitimate interests of non-minorities" is misplaced. The Court therein specifically noted that the reapportionment plan at issue produced "no fencing out the white population from participation in the political processes of the county." *Id.* at 165. Such plan did not carry the racial slur or stigma (*id.*) attendant to the operation of the MBE Amendment's exclusion of non-minorities. The Government offers no plausible analysis in support of its bare statement that non-minorities do not suffer an exclusion from their occupation (*see* Gov. Br. at 60-61).

CONCLUSION

For the above stated reasons, the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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